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Hinson v. Delis: California Adopts the Implied Warranty of Habitability

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HINSON v. DELIS: CALIFORNIA ADOPTS THE IMPLIED WARRANTY OF HABITABILITY

In *Hinson v. Delis*,[1] decided in June, 1972, California joined the growing list of jurisdictions which have found that a landlord impliedly warrants the habitability of premises he rents.[2] *Hinson* holds that a tenant may now withhold rental payments when his landlord fails to meet his statutory duty to maintain the premises substantially in accordance with either state or local housing regulations,[3] and that thereafter the tenant will be liable only for the reasonable rental value of the premises as determined by the court.[4]

This note will analyze briefly the reasons for sustaining an implied warranty of habitability in light of prior California laws,[5] explore the implications and significance of the *Hinson* decision,[6] and propose that a quasi-judicial agency be created to provide an easily accessible forum for the speedy resolution of rent withholding disputes.[7]

Hinson v. Delis

In November, 1968, tenant Hinson took possession of an apartment in the City of Richmond pursuant to a written month-to-month rental agreement at a monthly rate of $90. The following November, through no fault of Hinson, the bathroom floor began to weaken and a hole soon developed, apparently the result of dry rot. Shortly there-

1. 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

2. The holding in Hinson v. Delis applies to all hirings of dwellings used for human occupancy. In the absence of an agreement on the subject, an oral hiring of real property is presumed to be a month to month tenancy. CAL. CIV. CODE § 1944 (West 1954). Also, the terms lessee and tenant are used interchangeably, although strictly speaking a lessee is a party to a formal lease. *See* Stone v. City of Los Angeles, 114 Cal. App. 192, 199, 299 P. 838, 841 (1931).

3. State housing law requires that the Department of Industrial Relations acting through the Division of Housing shall promulgate and enforce housing rules and regulations for the protection of the health, safety and general welfare of the occupant. CAL. HEALTH & S. CODE § 17921 (West Supp. 1972). The regulations may be found in CAL. ADM. CODE, tit. 25, §§ 1000-90. Local governments may also impose restrictions; however, local ordinances must impose the same requirements as the state housing regulations. CAL. HEALTH & S. CODE § 17958 (West Supp. 1972).

4. 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666.

5. See text accompanying notes 33-71 *infra.*

6. See text accompanying notes 72-111 *infra.*

7. See text accompanying notes 112-125 *infra.*

after Hinson notified the landlord's resident manager about the hole and several other defects;[8] however, neither the landlord nor the manager did anything to fix any of the defects. Between November 1969 and March 1970, both Hinson and her 10-year-old son fell down in the bathroom because of the hole in the floor.[9] After her son fell, Hinson told the manager that she would not pay her rent until the proper repairs were made. In response, the landlord's manager covered the hole with the end of a wooden orange crate.

On March 3rd, 1970, at Hinson's request, a representative from the City of Richmond inspected the apartment,[10] confirmed the defects and found that they constituted violations of the Richmond Housing Code. By this time Hinson, who could not herself afford to hire a contractor to repair the defects,[11] had withheld $200—slightly more than two month's rent. Her landlord then served her with a three-day notice to pay rent or quit the premises. A few days later Hinson filed an action in superior court to enjoin the landlord's threatened eviction action, and for a declaratory judgment that a tenant is obligated to pay full rent only after the landlord has substantially complied with the housing codes.[12]

Following a default by the landlord, the trial court decided that

8. In addition to the hole in the bathroom floor, the toilet leaked and caused foul odors, the glass in the front door allowed a constant draft to enter the apartment and the linoleum on the kitchen floor failed to provide a water-repellant surface. 26 Cal. App. 3d at 64, 102 Cal. Rptr. at 662.

9. In late November 1969, the tenant fell through the hole and allegedly hurt her back. Between December 1, 1969, and the end of January 1970, she fell on two other occasions due to the hole and on February 4, 1970, the tenant's ten-year-old son fell in the bathroom because of the hole. *Id.*

10. Officers of local housing regulation enforcement agencies may inspect premises to secure compliance with or to prevent violations of the regulations. CAL. HEALTH & S. CODE § 17970 (West 1964). After giving thirty days notice to the landlord to abate any violations, the enforcement agency may bring any appropriate action or proceeding to alleviate the situation. *Id.* § 17980. However the adequacy of the present State Housing Law, *id.* §§ 17910-95, to secure and maintain suitable housing standards is questionable. See text accompanying notes 60-65 *infra.*

11. The cost of the repairs would have been more than $300. Hinson's sole source of income from November 1, 1969 to April 1, 1970 was an Aid to Families with Dependent Children (AFDC) monthly grant of $172 for her children and an Aid to the Totally Disabled (ATD) monthly grant of $158 for herself. 26 Cal. App. 3d at 65, 102 Cal. Rptr. at 662.

12. Five days after Hinson had filed the action in superior court the landlord received notice from the local housing representative of the defects. Three days later the landlord's manager made the repairs. The parties then entered an agreement that during the pendency of the action the landlord would not attempt to evict the tenant for nonpayment of the $200 withheld rent, and that the tenant would resume making her regular monthly rent payments as of April 1, 1970. *Id.* at 66, 102 Cal. Rptr. at 663. Therefore, the tenant's action to enjoin the threatened eviction was moot. *Id.* at 68, 102 Cal. Rptr. at 664.

this was a proper case for declaratory relief[13] but ruled in favor of the landlord, holding that a tenant has no legal or equitable right to withhold rent unilaterally.[14] On appeal, the issue presented to the first district court of appeal was whether the duty of the tenant to pay rent is dependent upon the landlord's duty to comply substantially with the housing codes. Calling the issue one of first impression, the court answered the question in the affirmative and held that the trial court erred in rejecting the tenant's claim.[15]

In support of its decision the appellate court first considered the illegal contract theory and the doctrine of constructive eviction. The rationale of the illegal contract theory is that where a contract is entered into for a prohibited purpose the contract is void and unenforceable.[16] The court notes cases in which the illegal contract theory is applied to declare void leases in which both parties knowingly made rental agreements which violated local and state housing laws.[17] However, the court found this theory inapposite for two reasons. First, in *Hinson* the defects which constituted violations of the housing codes became apparent during the period of occupancy, whereas most of the illegal contract cases involved agreements between the parties to waive patent defects existing at the time the lease was executed.[18] Since the defects in *Hinson* were not apparent at the time the parties entered into the rental agreement, the court would not infer that the parties had agreed to waive the housing code violations. Second, the tenant's remedy under the illegal contract theory is to treat the tenancy as ended because the lease is considered a nullity.[19] Therefore, the court felt the result of the illegal contract rationale—even if applicable—would defeat the wishes of a tenant such as Hinson who desired to remain in possession of the premises.[20]

13. *Id.* at 66, 102 Cal. Rptr. at 664. *See* CAL. CODE CIV. PROC. § 1060 (West Supp. 1972).

14. 26 Cal. App. 3d at 66, 102 Cal. Rptr. at 663. The trial court, however, did find the defects in Hinson's apartment to be substantial violations of the housing code. *Id.*

15. *Id.* at 71, 102 Cal. Rptr. at 667.

16. *Id.* at 66, 102 Cal. Rptr. at 664.

17. *E.g.*, Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130 (1913); Shepard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968).

18. *But see* 6 S. WILLISTON, THE LAW OF CONTRACTS § 1761 at 5000 (rev. ed. 1938) where it is stated that if the performance actually rendered by one seeking to enforce a contract is itself forbidden by law, the fact that the contract was intended for a lawful purpose will not justify recovery on the bargain if the illegality is more than an incidental part of the performance.

19. *See, e.g.*, cases cited note 17 *supra*. *But see* Diamond Housing Corp. v. Robinson, 257 A.2d 492, 495 (D.C. Ct. App. 1969) (where lease declared unenforcible tenant became a tenant at sufferance).

20. 26 Cal. App. 3d at 68, 102 Cal. Rptr. at 664.

Similarly, the court noted that under the doctrine of constructive eviction the tenant is required to abandon the premises within a reasonable time after giving notice of the defects to the landlord.[21] Although in recognition of the general scarcity of low-income housing[22] some courts have dispensed with the requirement of abandonment and have adopted a doctrine of partial constructive eviction, Judge Caldecott, writing for the *Hinson* court, stated that to continue the use of judicial fictions would be unnecessary when preferable alternatives exist.[23]

Guided by several decisions in other jurisdictions,[24] Judge Caldecott found a preferable alternative in the theory of implied warranty of habitability. Quoting from a leading Wisconsin case, the court noted that

> the legislature has made a policy judgment—that it is socially (and politically) desirable to impose [the duty to maintain the premises] on a property owner. . . . To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. . . .[25]

He concluded that the implied warranty theory permitted the most equi-

21. *Id.* at 69, 102 Cal. Rptr. at 665-66.

22. Hinson had actively looked for another place to live but was unsuccessful due to the scarcity of low-income housing in the Richmond-San Pablo area. An affidavit by the City Manager of Richmond estimated that only forty standard vacant units were available to low-income persons, and that the Housing Authority had more than 400 applicants on its waiting list for these units. *Id.* at 65, 102 Cal. Rptr. at 662.

23. *Id.* at 69-70, 102 Cal. Rptr. at 664. The result produced by the partial constructive eviction theory, similar to the implied warranty of habitability, does not absolve the tenant from the entire rent obligation, but allows a substantial reduction, on the theory that the tenant has been constructively evicted from only a portion of the premises. *See* Note, *Partial Constructive Eviction: The Common Law Answer in the Tenants' Struggle for Habitability*, 21 HASTINGS L.J. 417 (1970). However, with the exception of a few New York decisions, this doctrine has not been widely accepted. *Id.* at 429-31. As stated in Lemle v. Breeden, 51 Hawaii 426, 435, 462 P.2d 470, 475 (1969): "In spite of such imaginative remedies, it appears to us that to search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist."

24. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961). *See also* Bonner v. Beechem, CCH Pov. L. REP. ¶ 11,098 (Colo. County Ct., Denver, Feb. 20, 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Kline v. Burns, 276 A.2d 248 (N.H. Sup. Ct. 1971); Samuelson v. Quinones, 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972).

25. 26 Cal. App. 3d at 68, 102 Cal. Rptr. at 665, *quoting* Pines v. Perssion, 14 Wis.2d 590, 595-96, 111 N.W.2d 409, 412-13 (1961).

table remedy by requiring the tenant to pay the reasonable rental value of the premises, as determined by the trial court, so long as the tenant continues in possession and the housing code violations remain unrepaired.[26] However, only substantial code violations that occur through no fault of the tenant and which impair the habitability of the premises will entitle the tenant to a reduction in rent.[27]

Although *Hinson* was not an action for unlawful detainer, the decision implies that a tenant will now be able to assert the implied warranty theory as a defense in an unlawful detainer action based on nonpayment of rent.[28] This conclusion logically follows when one considers the definition of unlawful detainer. A tenant is guilty of unlawful detainer when he wrongfully defaults in rent and remains in possession after receiving three days' written notice from the landlord stating the amount which is due.[29] Since *Hinson* provides that the tenant is obliged to make rental payments only *after* the landlord substantially complies with the housing codes, it follows that the tenant could not be guilty of unlawful detainer because no rent is due until a reasonable rental value is determined by the court.[30]

Hinson also makes possible an alternative approach where the

26. 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666.

27. *Id.*

28. The court cited Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), apparently approving the ruling "that implied warranty of habitability was available as a defense to an unlawful detainer action." Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972). The court also stated: "If the tenant claims that all or a part of the rent is not due because of defects in the premises, the trial court may, during the pendency of the action and at the request of either party, require the tenant to make the rental payments at the contract rate into court as they become due for as long as the tenant remains in possession. At the trial of the action the court can then determine how the rent paid into court should be distributed." *Id.* at 71, 102 Cal. Rptr. at 666. See text accompanying notes 98-111 *infra.*

29. CAL. CODE CIV. PROC. § 1161(2) (West Supp. 1972). California courts generally have viewed unlawful detainer as a summary procedure intended to enable the landlord to obtain possession quickly and consequently have been reluctant to allow a tenant to defend in such actions. *E.g.*, Union Oil Co. v. Chandler, 4 Cal. App. 3d 716, 721, 84 Cal. Rptr. 756, 760 (1970). However, California courts have begun to question the unawful detainer procedure when it prevents doing substantial justice between the parties. *E.g.*, Schweiger v. Superior Ct., 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970) (defense of retaliatory eviction allowed); Mendoza v. Small Claims Ct., 49 Cal. 2d 668, 321 P.2d 9 (1958) (denial of the tenant's right to counsel in an action for possession is violative of due process); Mihans v. Municipal Ct., 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970) (holding unconstitutional CAL. CODE CIV. PROC. § 1166(a) (West 1955) which permitted a landlord to recover possession for nonpayment of rent upon a showing by affidavit of the tenant's insolvency without entitling the tenant to his "day in court"; Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962) (defense of racial discrimination allowed).

30. *See generally* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) for a discussion of the implied warranty theory as a defense in unlawful detainer.

tenant is reluctant to withhold rent because he is unsure whether the defects in the premises constitute a breach of the implied warranty of habitability.[31] In such a situation he may bring a declaratory judgment action in superior court to determine the proper reduction in rent, if any, that is warranted.[32]

Hinson v. Delis represents a substantial change in California law. Before exploring further the impact of this change, it may be helpful to examine briefly the development of the law leading up to the implied warranty of habitability.

From Caveat Emptor to the Implied Warranty of Habitability

Since feudal times a lease has been regarded as a conveyance of an interest in land.[33] Consequently, the law implied a covenant by the lessor that he would deliver possession[34] and in return the tenant was obligated to pay rent.[35] Thus, if a tenant actually was deprived of possession of all or part of the demised premises, his obligation to pay rent ceased because there was a failure of the consideration for which the rent was to be paid.[36] Similarly, there developed an implied covenant that the landlord would not interfere with the lessee's use of the demised premises—commonly referred to as an implied covenant of "quiet enjoyment."[37] If a landlord breached the implied covenant of "quiet enjoyment" his tenant could abandon the premises on the theory that he had been "constructively evicted."[38] Again, after the tenant

31. See text accompanying notes 124-25 *infra*.

32. CAL. CODE CIV. PROC. § 1060 (West Supp. 1972) provides in part: "Any person . . . who desires a declaration of his rights or duties . . . in respect to . . . property . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court . . . for a declaration of his rights and duties in the premises. . . . Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

33. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], at 178 (P. Rohan ed. 1971).

34. *Id.* ¶ 225[1], at 228.

35. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 228 (1969) [hereinafter cited as Quinn & Phillips].

36. *See* Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917) and cases cited therein.

37. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 225[3], at 232-40 (P. Rohan ed. 1971).

38. Dyett v. Pendleton, 8 Cow. 727 (N.Y. Sup. Ct. 1827) was the first case to recognize the doctrine of constructive eviction. Under this doctrine the tenant was required to abandon the premises within a reasonable time following the landlord's breach of the implied covenant, or he would be deemed to have waived the breach. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 225[3], at 239 n.28 (P. Rohan ed. 1971).

abandoned the premises his obligation to pay rent ceased because the rent obligation was deemed to issue out of the land.

However, the concept of *caveat emptor* shaped the background of the law governing the condition and maintenance of the premises. Hence, the landlord was under no duty to put or maintain the premises in a fit condition. The tenant took the premises as they were and assumed all risks as to their condition.[39]

In 1872, with the adoption of Civil Code sections 1941[40] and 1942,[41] California altered considerably the common law position on the duty of the landlord to make repairs. As originally enacted, section 1941 provided that in a lease of a dwelling for human occupancy the lessor was under a duty to maintain the premises in a habitable condition.[42]

As originally enacted, section 1942 permitted a tenant to repair any dilapidations that the lessor ought to repair and deduct the cost from the rent, or otherwise recover it from the lessor.[43] Perhaps fearful that section 1942 as originally enacted would permit a mischievous tenant to repair himself into a splendid home at the cost of his landlord,[44] the legislature in 1874 amended section 1942 to restrict the amount a tenant could deduct for the cost of repairs to one month's rent; however, the tenant was given the alternative of vacating the premises, in which case he was discharged from further obligations under the lease.[45]

39. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 233, at 300 (P. Rohan ed. 1971). The landlord was not liable for injuries to the tenant or to third persons sustained because of the condition of the premises. *See* W. PROSSER, HANDBOOK OF TORTS § 63, at 400 (4th ed. 1971). *See generally* Quinn & Phillips, *supra* note 35 for a discussion of the common law rules concerning landlord-tenant relations.

40. CAL. CIV. CODE § 1941 (Crocker 1872).

41. *Id.* § 1942.

42. *Id.* § 1941 provided: "The lessor of a building intended for the occupation of human beings must put it into a condition fit for that purpose, and repair all subsequent dilapidations thereof, except such as are [occasioned by the lessee's ordinary negligence]." Shortly after its enactment, this section was amended to permit the parties to a lease to waive the landlord's duty to repair. AMENDMENTS TO THE CALIFORNIA CODES § 205 at 245-46 (20th Sess. 1873-74). However, a recently added section provides that such agreements are void and contrary to public policy unless the parties agree in writing that the lessee shall undertake to repair all or part of the premises as part of the consideration for the rental. CAL. CIV. CODE § 1942.1 (West Supp. 1972).

43. CAL. CIV. CODE § 1942 (Crocker 1872) provided: "If, within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expenses of such repairs from the rent, or otherwise recover it from the lessor."

44. *See* Comment, *Landlord and Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAW. 298, 301-04 (1971).

45. AMENDMENTS TO THE CALIFORNIA CODES § 206 at 246 (20th Sess. 1873-74).

Despite the enactment of these statutes,[46] California courts continued for nearly one hundred years to follow the common law rule that in the absence of fraud, concealment or an express covenant, a landlord was under no duty to repair the leased premises.[47] For example, in *Moroney v. Hellings*,[48] decided in 1895, the landlord brought an unlawful detainer action against his tenant for nonpayment of rent. The tenant remained in possession and pleaded as a defense the allegedly dilapidated conditions of the premises as an offset to the rent. The court stated that no findings were necessary upon the tenant's defense since the lessee's exclusive remedies were those provided in section 1942.[49]

California courts generally also have held that under the doctrine of independent covenants, even where the landlord breaches an *express* covenant to repair, the tenant remains obligated to pay rent so long as he remains in possession, unless the covenant to repair was ex-

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As amended, CAL. CIV. CODE § 1942 (West 1954) provided: "If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions." A 1970 amendment to this section has restricted the exercise of the repair and deduct remedy to once every twelve-month period. See text accompanying note 67 *infra*.

46. It is interesting to note that the writers of the original section 1941 in explaining the intent of the legislature in requiring a landlord to ensure that the premises were livable, stated that: "This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year eighteen hundred and sixty-one, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not arise again and again for adjudication were it not that the community at large revolt [sic] at every application of the rule." Note to CAL. CIV. CODE § 1941 (Crocker 1872).

47. *E.g.*, Gately v. Campbell, 124 Cal. 520, 57 P. 567 (1899); Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963); Farber v. Greenberg, 98 Cal. App. 675, 277 P. 534 (1929).

48. 110 Cal. 219, 42 P. 560 (1895).

49. *Id.* at 221, 42 P. at 560. The same line of reasoning was set forth in Farber v. Greenberg, 98 Cal. App. 675, 682, 277 P. 534, 537 (1929): "In the absence of an express covenant by the landlord to repair, sections 1941 and 1942 control; and in such case it is held that the statutory liability of the lessor declared in section 1941 is limited by the provisions of section 1942, so that for failure to repair, the lessee has either one of two remedies, viz.: (a) Treat the failure to repair as a breach of the lease and vacate the premises; (b) Himself make the repairs at the expense of the landlord, after notice to him, provided they do not entail an expenditure of more than one month's rent."

pressly or impliedly a condition precedent to the coveant to pay rent.[50] However, the courts have been willing to construe covenants contained in a lease as mutually dependent where they go to the very root of the consideration for the lease.[51]

Rationale for Implying a Warranty of Habitability in California

Despite the strong influence of the caveat emptor philosophy on California landlord-tenant law, the *Hinson* court, in an opinion perhaps as noteworthy for the summary fashion by which it reached the conclusion as for the result actually reached, willingly adopted the implied warranty theory. Although the court in *Hinson* did not discuss Civil Code sections 1941 and 1942, the more recent case of *Ball v. Tobeler*,[52] in which the second district court of appeal approvingly followed *Hinson*, did discuss these sections. In *Ball* the court recognized that previous decisions had held that a tenant's remedies for improperly maintained housing were limited by section 1942.[53] Evidently persuaded by much recent commentary on the plight of the low-income tenant,[54] the court stated that sections 1941 and 1942 defined only the *self-help remedies* available to a tenant and were not intended to embody all of the relief which the law should afford a tenant living in substandard housing.[55]

Furthermore, most of the California decisions holding that section 1941 did not alter the common law to any extent greater than the remedies provided in section 1942 were decided before housing codes were generally adopted in California.[56] Thus, the courts in both *Hin-*

50. *See* Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424 (1915). *See generally* Comment, *Plotting the Long-Overdue Death of Caveat Emptor in Leased Housing*, 6 U.S.F. L. REV. 147 (1972) for a discussion of the origin and growth of the doctrine of independent covenents.

51. *See* Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 418-19, 132 P.2d 457, 462 (1942); Groh v. Kover's Bull Pen, Inc. 221 Cal. App. 2d 611, 614, 34 Cal. Rptr. 637, 639 (1963) (express covenant to repair the roof held dependent).

52. 2 Civil No. 38424 (Cal. Dist. Ct. App., filed Sept. 13, 1972).

53. *Id.* at 10-11 *citing* Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963); Farber v. Greenberg, 98 Cal. App. 675, 277 P. 534 (1929).

54. In Ball v. Tobeler, 2 Civ. No. 38424 at 14, the court cited Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970) [hereinafter cited as Loeb]; Note, *Judicial Expansion of Tenant's Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971); Comment, *Landlord and Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAW. 298 (1971); Comment, *The Tenant as a Consumer*, 3 U.C. DAVIS L. REV. 59 (1971).

55. Ball v. Tobeler, 2 Civ. No. 38424 at 13.

56. *But see* Metcalf v. Chiprin, 217 Cal. App. 2d 305, 309, 31 Cal. Rptr. 571, 574 (1963) where the second district court of appeal held the housing code did not cre-

son and *Ball* felt that to continue to follow these cases would be inconsistent with the current legislative policy concerning housing standards.[57]

Perhaps the most noteworthy case implying a warranty of habitability on which the *Hinson* and *Ball* courts relied is *Javins v. First National Realty Corp.*[58] Judge J. Skelly Wright, writing for the United States Court of Appeals for the District of Columbia, noted that, although the legislature had declared a need for adequate housing, enforcement of housing regulations had been far from effective and that deplorable conditions in rental housing persisted in the District of Columbia and in the nation. Therefore, the common law rule that the landlord was under no duty to repair no longer could be justified in a modern urban society.[59]

The reasons that persuaded the District of Columbia court to adopt the implied warranty of habitability theory apply with equal force in California. Quite often the low-income tenant in California

ate any rights or duties between landlord and tenant. However in light of Ball v. Tobeler, also decided by the second district court, *Metcalf* should be considered overruled on that point.

57. Hinson v. Delis, 26 Cal. App. 3d at 68-69, 102 Cal. Rptr. at 665; Ball v. Tobeler, 2 Civ. No. 38424 at 14-17. Although the implied warranty of habitability theory previously had not been adopted in California, *but see* Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (Super. Ct. App. Div. 1967) (dictum), California courts recently have begun to hold in tort cases that both the State Housing Law and local housing codes impose a duty on the landlord to properly maintain and repair rented premises. *E.g.*, Grant v. Hipsher, 257 Cal. App. 2d 375, 64 Cal. Rptr. 892 (1967) (local housing ordinance); Ewing v. Balan, 168 Cal. App. 2d 619, 336 P.2d 561 (1959) (State Housing Law).

In McNally v. Ward, Justice Tobriner, then writing for the first district court of appeal, held that a city housing ordinance imposed upon the landlord a duty to repair. 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961). In *McNally*, the tenant had been injured due to the landlord's failure to inspect and repair a defective railing. The landlord relied on the holding in Gately v. Campbell, 124 Cal. 520, 523, 57 P. 567, 568 (1899), that "the only consequence of a breach of the landlord's obligation [as imposed by Civil Code section 1941] is that the tenant may either vacate the premises or expend one month's rent on repairs." Rejecting this argument, Justice Tobriner pointed out that the tenant did not rely on section 1941 but contended that the very enactment of the ordinance demonstrated that the city intended that the duty of the landlord to repair be extended to protect the class of persons of which she was a member. 192 Cal. App. 2d at 877, 14 Cal. Rptr. at 264. He continued that if the only effect on tenants of the housing ordinance was to establish their right to repair and deduct the cost, the ordinance would be pointless in view of Civil Code sections 1941 and 1942. *Id.* In light of this trend, the court in *Hinson* took the next step in holding that the landlord's duty to repair as imposed by the housing codes is a condition precedent to the tenant's duty to pay rent.

58. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), *noted in* 39 GEO. WASH. L. REV. 152 (1970), *cited with approval* in Hinson v. Delis, 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666 *and* Ball v. Tobeler, 2 Civ. No. 38424 at 14.

59. 428 F.2d at 1082.

lives in substandard housing.[60] Despite the fact that the State Housing Law[61] requires local housing departments to enforce the regulations promulgated thereunder,[62] the tenant often is confronted with confusion when seeking help from the agencies charged with enforcement responsibility because the agencies frequently are understaffed and inefficiently organized.[63] Furthermore, enforcement responsibility often is divided between various departments within the agencies, each having jurisdiction over particular code violations.[64] Also, because numerous hearings are required at different levels within the agencies before action can be taken, even when the tenant contacts the appropriate department within the bureaucratic morass, a recalcitrant landlord usually can avoid compliance for a long period of time.[65]

The remedies afforded the tenant under the repair and deduct statute also are inadequate. The tenant is able to make only relatively minor repairs because the amount he may deduct is limited to one month's rent.[66] In 1970 the state legislature further restricted this remedy by providing that a tenant may expend a month's rent on repairs only once within any twelve-month period.[67] Due to the scarcity of adequate low-income housing, the alternative remedy of vacating the premises also provides no real solution to a tenant living in a dwelling which is below the habitability standards required by law.[68]

The inadequacy of the tenant's remedies absent the implied warranty is particularly undesirable, for as noted by Judge Wright in *Javins*:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also

60. *See* Loeb, *supra* note 54 at 287.

61. CAL. HEALTH & S. CODE §§ 17910-95 (West 1964).

62. *Id.* § 17961 (West Supp. 1972).

63. *See* Loeb, *supra* note 54, at 293-96.

64. For example, in San Francisco, electrical problems come under the jurisdiction of the Electrical Inspection Division of the Bureau of Building Inspection of the Department of Public Works, while plumbing problems are under the jurisdiction of the Plumbing Inspection Division. SAN FRANCISCO, CAL., ELECTRICAL CODE § 601 (1968); SAN FRANCISCO, CAL., PLUMBING & GAS APPLIANCE CODE § 201 (1970). This creates the possibility of the tenant being referred back and forth in situations where, because of the nature of the defect, it is not clear what department has jurisdiction.

65. *See, e.g.*, Loeb, *supra* note 54, at 295 n.36. Problems also arise because the major enforcement mechanism employed by the agencies is abatement through the eviction of all the tenants, and possibly, demolition of the building. Id. at 294. Needless to say this only can have disastrous consequences for a tenant in need of a suitable place to live.

66. CAL. CIV. CODE § 1942(a) (West Supp. 1972). See text accompanying notes 40-45 *supra.*

67. CAL. CIV. CODE § 1942(a) (West Supp. 1972).

68. See note 22 *supra.*

> adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[69]

Noting that implied warranties of fitness of use and merchantability are well established in the law of sales, even with regard to sales of real property,[70] Judge Caldecott approvingly quoted from the *Javins* opinion: "Contract principles established in other areas of law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings."[71]

Implementing Hinson v. Delis

The decision in *Hinson v. Delis* leaves a number of questions unanswered. The court set forth no clear test for determining what type of defects would be sufficiently material to warrant a reduction in rent, nor did the court offer any guidelines for determining the reasonable value of defective premises. The court also stated that the tenant must notify the landlord of the defects before he may withhold rent and also that the trial court may order the tenant to pay the rent into court during the pendency of the action. This section will examine each of these elements of the decision.

What Is a Material Breach?

The standard of habitability which the landlord is deemed to warrant is governed by the applicable housing codes.[72] Judge Caldecott stated in *Hinson* that in determining the materiality of an alleged breach, both the seriousness of the claimed defect and its duration should be considered. Minor housing code violations which do not affect habitability must be considered *de minimus*.[73] Thus, where the tenant withholds rent in the *erroneous* belief that he is entitled to a reduction in rent, judgment for possession will be entered for the landlord.[74]

69. 428 F.2d at 1074.

70. 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666. The same public policy reasons of fairness that have convinced courts to protect the consumer's legitimate expectations apply with equal force in the area of landlord-tenant relations. *See* Comment, *The Tenant as a Consumer*, 3 U.C. DAVIS L. REV. 59 (1971).

71. 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666, *quoting* Javins v. First Nat'l Realty Corp., 428 F.2d at 1080.

72. Hinson v. Delis, 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 666-67 (1972); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072 (D.C. Cir.).

73. 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666; *accord*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.63 (D.C. Cir. 1970).

74. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 (D.C. Cir. 1970). However this result apparently has been changed by statute in the District of Colum-

Although the cases dealing with the implied warranty of habitability have not made clear what test the trier of fact should utilize to determine whether an alleged breach is material, rat infestation,[75] defective plumbing, heating and wiring,[76] improper grading of a driveway resulting in the premises being flooded,[77] and a hole in the bathroom floor[78] have each been held sufficient to constitute a breach of the implied warranty of habitability. Where the line will be drawn remains to be determined by case law; however, in *Academy Spires, Inc. v. Brown*,[79] it was held that lack of painting, leaky faucets and defective venetian blinds may be unpleasant but are not within the category of uninhabitability and should not be considered for the purpose of reducing the tenant's rental obligation.[80]

California Civil Code section 1941.1[81] provides that a dwelling is untenantable for purposes of section 1941[82] if it substantially lacks: effective waterproofing and weather protection, including unbroken windows; properly maintained plumbing facilities; an approved water supply capable of producing hot and cold running water which is connected to an approved sewage system; approved and properly maintained electrical lighting equipment; generally sanitary conditions at the commencement of the lease or rental agreement; an adequate number of receptacles for garbage and rubbish; or properly maintained floors, stairways, and ceilings.

Section 1941.1 may serve as a useful preliminary guide for determing what types of housing code violations may affect habitability but the section should not be considered an exhaustive list. The State Housing Regulations[83] impose many standards for the construction and maintenance of dwellings for the purpose of protecting the health and safety of the occupants, not all of which are specifically enumerated in section 1941.1.[84] Certainly the landlord would also be in breach of

bia. Now if the tenant withholds rent in a good faith but erroneous belief that the landlord is in breach of the implied warranty, he should be able to remain in possession if he subsequently pays all of the rent that is determined to be due. *See* DISTRICT OF COLUMBIA LANDLORD-TENANT REG. § 2910(c) (reproduced in H.J. Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909, 960 (1971)). See notes 124 & 125 and accompanying text *infra*.

75. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969).

76. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961).

77. *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

78. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

79. 111 N.J. Super. 477, 268 A.2d 556 (1970).

80. *Id.* at 482-83, 268 A.2d at 559.

81. CAL. CIV. CODE § 1941.1 (West Supp. 1972).

82. *Id.* § 1941 (West 1954).

83. CAL. ADM. CODE, tit. 25, §§ 1000-90.

84. *E.g., id.* §§ 1082-84 impose minimum requirements for fire protection facilities and equipment; *id.* § 1086 imposes minimum excavation and grading requirements.

the implied warranty if he substantially violated any of these regulations and such violation impaired the habitability of the premises.

What Is the Reasonable Value of Substandard Premises?

The courts that have adopted the implied warranty of habitability theory have been reluctant to hold that the tenant is absolved from paying all rent because to do so would give the tenant "something for nothing."[85] Thus, these courts have held that the tenant remains liable for the "reasonable rental value" of the premises while the violations exist.[86]

Methods for determining what constitutes reasonable value remain to be formulated by case law. However, the approach taken in a recent New Jersey decision is worth noting. In *Academy Spires, Inc. v. Brown*,[87] the court held that the landlord's failure to supply heat, hot water, garbage disposal or elevator service to a ninth story apartment constituted a breach of the implied warranty of habitability and that therefore those defects should be considered in determining the proper reduction in rent.[88] The tenant produced no expert testimony to show the fair value of the premises. Rather, the tenant urged that the rent be lowered by a percentage equal to the percentage by which the defects reduced the tenant's use of the premises.[89] In adopting this percentage reduction approach, the court noted that triers of fact daily translate personal injuries into money damages with relatively imprecise guidelines without violating the requirement that damages be determined with reasonable certainty.[90] The court indicated that any benefit derived from the use of expert testimony would be outweighed by the cost of such testimony which would place an extreme burden on the typical low-income tenant,[91] and concluded that a 25 percent reduction was a fair adjustment of the tenant's rent.[92]

The percentage reduction approach followed in *Brown* prevents a landlord from arguing that the agreed rate of rent is the "reasonable rental value" of the premises *even with the defects*. Considering the

85. *See, e.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). *But see* Bonner v. Beechem, CCH Pov. L. Rep. ¶ 11,098 (Colo. County Ct., Denver, Feb. 20, 1970), where the court held there was a total failure of consideration and that therefore no rent was due.

86. *E.g.*, Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972).

87. 111 N.J. Super. 477, 268 A.2d 556 (1970).

88. *Id.* at 482, 268 A.2d at 559.

89. *Id.* at 485, 268 A.2d at 561.

90. *Id.* at 486, 268 A.2d at 561.

91. *Id.* at 487, 268 A.2d at 562.

92. *Id.* at 488, 268 A.2d at 562.

scarcity of low-income housing,[93] it is entirely possible that the fair market value of defective premises might equal, and in some cases exceed, the contract rate. The *Brown* approach, however, makes the contract rate the starting figure which must be *reduced* by some percentage if the defects complained of constitute a material breach of the implied warranty of habitability.

This approach is desirable since the underlying social policy is not only to insure that the tenant pays no more rent than is reasonable, but also to encourage the landlord to comply with housing regulations. The percentage reduction method of determining the reasonable rent appears to serve both purposes by ensuring that a tenant's rent obligation will be reduced when a material breach occurs, thus motivating the landlord to make the necessary repairs.[94]

The Notice Requirement

In *Hinson v. Delis* the court made clear that before a tenant may withhold rent he must give notice of the alleged defects to the landlord and allow a reasonable time for the repairs to be made.[95] Presumably the court imposed this requirement out of a sense of fairness to the landlord and to obviate the court's consideration of matters which might be resolved by the parties without court intervention. Thus, the fact of notice is an element of the implied warranty of habitability defense.

The notice requirement makes it more probable that continuing defects are the product of the landlord's willful failure to make repairs. Furthermore, this requirement does not seem to impose a significant burden on the tenant since it seems unlikely generally that a tenant would begin withholding rent because of "substantial" defects in the premises without first asking his landlord to make repairs.[96]

93. See notes 22 & 60 and accompanying text *supra.*

94. If the landlord continues to fail to make the repairs, the tenant should seek injunctive relief arguing that the landlord is engaged in a business practice which is both unlawful and unfair and that therefore injunctive relief is appropriate. *See* CAL. CIV. CODE § 3369 (West 1970). The court in Ball v. Tobeler accepted this argument stating "[t]he reasoning of *Hinson* places a tenant in a position akin to that of a consumer. The sweeping language of section 3369 of the Civil Code embraces the unlawful practice of a landlord as alleged. . . . Consequently, the [tenants'] allegations sufficiently state a cause of action for injunctive relief under section 3369. . . ." 2 Civ. No. 38424 at 20 (Cal. Dist. Ct. App., filed Sept. 13, 1972).

95. 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666.

96. Where the landlord denies that notification or knowledge of the defects, a strong argument can be made that there should be a presumption affecting the burden of proof that the landlord had notice. Certainly once the tenant shows that before he began withholding rent substantial defects existed for a length of time sufficient for them to be repaired, it is reasonable to infer that the tenant had asked the landlord to make the repairs. Where proof of a fact renders the inference of the existence of

In *Hinson* the court did not specify any particular means by which the landlord must be notified. However, in discussions with legal service attorneys it was pointed out that the landlord associations may seek legislation requiring the tenant to give *written* notice of the defects before he may withhold rent.[97] If the real reason for a notice requirement is to ensure that the landlord has knowledge of the defects,

another fact so highly probable that it is sensible to assume the truth of that other fact, courts generally raise a presumption of the existence of that other fact. C. MCCORMICK, THE LAW OF EVIDENCE § 343 at 806-07 (E. Cleary ed., 2d ed. 1972). CAL. EVID. CODE § 605 (West 1966) states that a presumption affecting the burden of proof is proper when it implements some public policy other than simply to facilitate the determination of the particular action in which it is applied. A presumption that the landlord has notice of defects would implement the public policy declared by the legislature that unsafe and unsanitary dwelling accomodations are contrary to the public interest. CAL. HEALTH & S. CODE §§ 33250-51 (West Supp. 1972). Furthermore, the landlord is already under a duty to inspect the premises in order to prevent injury to the tenant or third persons. McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961).

97. As evidence of landlords' apparent ability to secure favorable legislation limiting a judicial decision in this area of the law, compare CAL. CIV. CODE § 1942.5 (West Supp. 1972) with Schweiger v. Superior Ct., 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970). In *Schweiger* the California Supreme Court upheld the defense of retaliatory eviction in an unlawful detainer action. In that case the landlord had raised the rent in retaliation to the tenant exercising his rights under the repair and deduct statute. The Supreme Court reasoned that to permit this type of retaliation would unduly frustrate the self-help remedy of CAL. CIV. CODE § 1942. CAL. CIV. CODE § 1942.5, which was added by the 1970 legislature, limits the availability of the defense provided in *Schweiger* in two respects: it is available only once in any twelve-month period and it is available only within sixty days of the event which prompted the retaliation. *See* Note: *Retaliatory Eviction as a Defense to Unlawful Detainer—Alternative Approaches*, 22 HASTINGS L.J. 1365 (1971).

The decision in Hinson v. Delis raises a similar question where a tenant withholds rent: may a landlord terminate a month to month tenancy by giving the tenant thirty days notice as provided by CAL. CIV. CODE § 1946 (West. Supp. 1972) and then bring an unlawful detainer action pursuant to CAL. CODE CIV. PROC. § 1161(5) (West 1972) if the tenant holds over after the tenancy has been thus terminated. Clearly if this type of action is allowed we would have the anomalous situation that if a landlord served a three day notice and brought an action for possession for default in rent the tenant could defend on the basis of *Hinson*; but if the landlord served a thirty day notice on the tenant, the tenant would have no defense at all. Because most low-income housing is let on a month to month basis, this type of retaliatory action would undermine *Hinson's* impact for the class of tenants most likely to benefit from the decision.

This precise problem recently has been resolved in the District of Columbia in favor of permitting the tenant to defend an eviction proceeding by showing that it was brought to retaliate for the tenant's assertion of his rights under the implied warranty theory by withholding rent. Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972). As California courts have followed the guidance of the District of Columbia both on retaliatory eviction, *see* Schweiger v. Superior Ct., and its principal reliance upon Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), and the implied warranty theory, see text accompanying notes 58

the way in which he learns that he is violating the law should have no effect whatever on a tenant's assertion of his rights. Furthermore, since it is unlikely that a tenant would withhold rent because of substantial defects without first informing his landlord of the condition, it is doubtful that requiring written notice would further the purpose of the notice requirement. Thus, if written notice is required, it would permit a landlord to defeat an otherwise valid defense on a mere technicality and would unnecessarily preclude consideration of the merits of the tenant's claim.

The Landlord's Protective Order

With the growing trend to permit tenants to raise certain defenses in unlawful detainer actions, the need to protect the landlord is apparent. He has lost the advantage of the summary proceeding and is instead exposed to the possibility of prolonged litigation, during which the tenant may remain in possession without paying rent. Furthermore, even a landlord found not to be in breach of the implied warranty may be unable to collect back rent from a tenant who has spent the withheld rent and who is now insolvent. Thus, the longer the proceeding, the more the landlord stands to lose.

In recognition of this danger and also of the possibility that a tenant might withhold rent without good cause, the courts in the District of Columbia[98] have devised a method, adopted by the court in *Hinson*,[99] to protect the landlord from unjustified losses. During the pendency of an action, upon the request of either party, the tenant may be required to pay rent at the contract rate into court *as it becomes due*, as long as the tenant remains in possession of the allegedly defective premises. At the conclusion of the trial, the money paid into court will be distributed in accordance with the findings of the court.[100]

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and 59 *supra*, it is reasonable to suppose that California courts also will follow the District's example on this question.

It also should be noted that CAL. CIV. CODE § 1942.5 is applicable only when a tenant has either exercised his rights under the civil code or has notified a housing agency of the defects. Since a tenant withholding rent pursuant to *Hinson* is not exercising any rights granted by the civil code, the limitations imposed upon the retaliatory eviction defense by section 1942.5 should not apply.

98. Bell v. Tsintolas Realty Co., 430 F.2d 474, 481-82 and nn.18 & 21 (D.C. Cir. 1970); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970).

99. 26 Cal. App. 3d at 71, 102 Cal. Rptr. at 666.

100. *Id.* It should be noted that, at least in the District of Columbia, this applies only to future payments and not to back rents already due but unpaid. Bell v. Tsintolas Realty Co., 430 F.2d at 483. The reason given in *Bell* was that to require *back rent* alleged to be due would depart from the protective purpose of the order and would be in the nature of a penalty, since in the District of Columbia a landlord cannot recover back rent in a suit for possession. *Id.* However in California the landlord may re-

Recognizing that "such a protective order represents a noticeable break with the ordinary processes of civil litigation, in which, as a general rule, the plaintiff has no advance assurance of the solvency of the defendant,"[101] the court in *Bell v. Tsintolas Realty Co.* emphasized that the order should be entered only upon proper motion and after notice and opportunity for a hearing on the motion.[102]

In *Hinson* the court did not give any guidelines to help trial courts in determining when to issue the order. However, the federal appeals court in *Bell* offered the following suggestions:

> In making a determination of [the landlord's] need [for the protective order], the trial court may properly consider the amount of rent alleged to be due, the number of months the landlord has not received even a partial rental payment, the reasonableness of the rent for the premises, the amount of the landlord's monthly obligations for the premises, whether the tenant has been allowed to proceed *in forma pauperis*, and whether the landlord faces a substantial threat of foreclosure.
>
> Even if the landlord has adequately demonstrated his need for a protective order, the trial judge must compare that need with the apparent merits of the defense based on housing code violations. Relevant considerations would be whether the housing code violations alleged are *de minimus* or substantial, whether the landlord has been notified of the existence of the defects and, if so, his response to that notice, and the date, if known, of the last repair or renovation relating to the alleged defect.[103]

The court added that in certain instances the trial court should order deposited in court an amount less than the contract rate.[104] For example, when there is a very strong showing of housing code violations,[105] an order to deposit an amount less than the contract rate

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cover rent which is already due in the action for possession. CAL. CODE CIV. PROC. § 1174 (West Supp. 1972). Therefore it would seem that in California there is no reason to limit the application of the protective order only to future payments.

101. Bell v. Tsintolas Realty Co., 430 F.2d at 479.

102. *Id.* at 483. In the absence of a hearing on the motion, entry of an order is at least a questionable procedure. *Cf.* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), holding violative of procedural due process a Wisconsin statute which provided for prejudgment garnishment of wages. Although the court in *Bell* did not discuss the matter in detail, it obviously was concerned with possible violation of the tenant's constitutional rights if a proper hearing on the motion was denied. *See* 430 F.2d at 479 n.10. *See also* Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (1971) where the court held violative of due process the requirement in N.Y. MULT. DWELL. LAW § 302-a(3)(c) (McKinney Supp. 1972) that before a tenant may show that the premises are substandard as a defense to an action for possession based on nonpayment of rent, the tenant must deposit into court the amount of rent sought to be recovered.

103. 430 F.2d at 484.

104. *Id.*

105. This might be shown by the tenant offering the testimony of a housing reg-

would be appropriate, for in such a case it is fairly certain that the court ultimately will set a reasonable rental value which is lower than the contract rate.

Nevertheless, implementation of this procedure, although followed in *Hinson*, possibly is beyond the authority of California courts. Code of Civil Procedure section 572 authorizes a court to order a deposit into court, upon motion, only "when it is admitted by the pleadings, or shown upon the examination of a party to the action, that he has in his possession, or under his control, any money . . . being the subject of litigation . . . which belongs or is due to another party. . . ."[106] The prerequisites to the issuance of such an order have been strictly adhered to. As stated in *Frey v. Superior Court*,[107] it is essential "that the party from whom the payment is asked has no right or title to hold the money, and that it belongs or is due another."[108] Furthermore, a court will not require a litigant to surrender his property to another, or for his benefit, until there has been a judicial hearing and determination that he has no right to such property.[109]

Thus, in ordering a tenant to pay rent into court it appears first, that there must be a preliminary hearing on the merits of the case, and second, that a court cannot order the tenant to pay a greater amount into court than he is shown to owe the landlord. It also has been held that if the money to be deposited into court is not the subject of the litigation, but its payment is a mere incident thereto, dependent upon the judgment to be rendered, the order to deposit the money into court is not authorized.[110] Since the recovery of rent is a mere incident of an unlawful detainer action to regain possession,[111] it is possible that protective orders may be held to be unauthorized by Code of

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ulation enforcement official indicating that the premises are defective. Yet, it should be noted that an official inspection is not a prerequisite to the defense of breach of implied warranty of habitability. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.62 (D.C. Cir. 1970). This conclusion is directly supported by *Hinson* where the inspection was not conducted until after the tenant had withheld rent. 26 Cal. App. 3d at 65, 102 Cal. Rptr. at 662-63. The testimony of an official from the local enforcement agency is merely evidence of the breach. However, as a practical matter an inspection probably should be requested before trial, as an inspector's testimony, if favorable, should provide very convincing evidence.

106. CAL. CODE CIV. PROC. § 572 (West 1954).

107. 22 Cal. App. 421, 134 P. 733 (1913).

108. *Id.* at 425, 134 P. at 735.

109. *See* Green v. Duvergey, 146 Cal. 379, 385, 80 P. 234, 236-37 (1905); *In re* Elias, 209 Cal. App. 2d 262, 273, 25 Cal. Rptr. 739, 746-47 (1962).

110. *E.g., In re* Elias, 209 Cal. App. 2d 262, 273, 25 Cal. Rptr. 739, 746-47 (1962).

111. Lynn v. Cable, 95 Cal. App. 2d 696, 698-99, 213 P.2d 521, 522 (1950); D'Amico v. Riedel, 95 Cal. App. 2d 6, 9, 212 P.2d 52, 54 (1949); Hennessy v. Gleason, 81 Cal. App. 2d 616, 623, 184 P.2d 913, 918 (1947).

Civil Procedure section 572, even where a proper hearing has been held. Thus, although the *Hinson* court approved the use of protective orders for the benefit of the landlord, such a procedure may not survive in California.

A Proposal

Even if California courts determine that it is within their general equitable power to enter a protective order requiring the tenant to make the rental payments into court,[112] the present procedures do not adequately protect the landlord or the tenant. Although the protective order insures that the landlord ultimately will receive whatever amount of rent is determined to be payable to him, he is nevertheless without rental income during the pendency of the litigation. Without the flow of rent the landlord may have substantial trouble meeting his financial obligations and in some situations face foreclosure. Even if the tenant ultimately prevails, he will nonetheless be obligated to pay *some* rent, and so to deny the landlord all rent during the pendency of the litigation seems unduly harsh.[113]

Also manifest are the disadvantages to the tenant of a protracted procedure for determining whether the landlord is in breach and if so, the proper amount of rent due. The tenant primarily is interested in having the necessary repairs made; but denying the landlord all rent during the pendency of the litigation makes it less likely that the landlord will be able to afford to make the repairs prior to the conclusion of the action. Thus, the longer the proceedings take, the more aggravated the tenant's inconvenience.

Many of the disadvantages inherent in the present procedures could be eliminated in California by establishing local agencies to make prompt and uniform determinations of whether the landlord is in breach, the appropriate reduction in rent, and subsequently to ascertain whether sufficient repairs have been made to justify reinstating the original rent.[114]

112. In Bell v. Tsintolas, 430 F.2d 474, 482 (D.C. Cir. 1970) the court stated: "[W]e have little doubt that the Landlord and Tenant Branch of the Court of General Sessions may fashion an equitable remedy to avoid placing one party at a severe disadvantage during the period of litigation."

113. A recent study of the unlawful detainer procedure in Oakland, California, indicated that it takes an average of more than fifty-four days from the initiation of eviction proceedings to execution of the judgment for possession. LANDLORD-TENANT INTERVENTION UNIT OF THE OAKLAND POLICE DEPT., SMALL CLAIMS COURT AND THE URBAN LANDLORD 14 (rough draft, 1972). This delay undoubtedly will be increased if a tenant asserts the defense of breach of implied warranty of habitability.

114. Comparable agencies exist in other states. For example, in Michigan and Pennsylvania the local housing regulation enforcement agencies are authorized to cer-

A tenant seeking administrative review of what he considers substandard premises could contact the proposed local agency and request that an inspection be conducted to determine whether the alleged violations are substantial—*i.e.*, whether the landlord is in breach of the implied warranty. If substantial violations are found the agency should then notify both parties of the determination. The tenant could then request that an official hearing be held to determine the appropriate reduction in rent and the agency should notify both parties of the time and place the hearing will be held.

If a tenant chooses to withhold rent as permitted by *Hinson*—either with or without first having requested an inspection by the local agency—the landlord should be permitted to have the agency review the dispute.[115] Upon being contacted by the landlord the agency should conduct an inspection of the premises if one has not been made prior to the tenant's decision to withhold rent. If the inspection discloses substantial defects, the agency should give notice and conduct a hearing to determine the proper adjustment of rent.[116] If, on the other hand,

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tify that a dwelling is eligible for rent withholding without judicial intervention. The rents are then paid into an escrow fund to be used for repairs. When the dwelling is again certified as fit for human habitation the excess money deposited is paid to the landlord. In Pennsylvania if the premises are not certified as fit within six months the money is returned to the tenant. MICH. COMP. LAWS ANN. §§ 125.529(1), 125.530(3), (4) (Supp. 1972); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1972). New Jersey permits local governments to promulgate ordinances that would allow local housing officials to reduce rent by a limited amount in buildings that are found to be "substandard." N.J. STAT. ANN. § 2A: 42-74 to -84 (Supp. 1972).

New York and Illinois have special statutory procedures that allow social welfare agencies to withhold rent payments when a building that houses welfare recipients is dilapidated. N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966); ILL. REV. STAT. ch. 23, § 11-23 (Supp. 1972). It must be pointed out that in each of these states the tenant's statutory right to withhold rent or to a reduced rent is dependent upon agency action. *But see* N.Y. MULT. DWELL. LAW. § 302-a (McKinney Supp. 1972) which permits a tenant to defend an action for possession because of nonpayment of rent where serious violations of the housing code have occurred.

115. The main difference between the type of agency proposed here and those of other states is that here the tenant's right to withhold rent is not necessarily dependent upon agency action. This is desirable because if the agency becomes overburdened and as a result functions too slowly, the tenant will not be left without a remedy. However in cases where the tenant is paying rent and seeks a determination of the appropriate rent reduction, the proposed agency does not materially differ from the type authorized by, for example, the New Jersey statute. N.J. STAT. ANN. § 2A: 42-74 to -84 (Supp. 1972).

116. Absent notice and proper hearing *any* agency action probably would be deemed a denial of procedural due process. See note 103, *supra*. Obviously it is desirable that the parties be notified and the hearing be scheduled as expeditiously as possible, particularly where the tenant is not paying rent, since the effectiveness of the proposed agency in alleviating the present problems depends upon its ability to act quickly.

the inspection reveals no substantial defects, the tenant should be so advised; if he persists in withholding rent, the landlord would be entitled to sue for unlawful detainer and the agency findings should preclude the tenant from raising the breach of implied warranty defense.

At the hearing the parties should have the right to give testimony and to be represented by counsel[117] to insure that the hearing is conducted fairly.[118] Upon the conclusion of the hearing the agency official, when appropriate, should enter a finding of the percentage reduction in use[119] caused by the violations and determine the corresponding reduction in rent.[120]

The agency official should then issue an order requiring the tenant, if he has not been paying rent, to pay the amount of past rent found due and to begin paying rent to the landlord at the reduced rate, or if the tenant has been paying rent, an order that he need only pay rent at the reduced rate. This order would, of course, be reviewable by the courts. However, if the tenant refuses or is unable to pay the reduced rent, the landlord should be able to bring an unlawful detainer action for default in rent[121] and the tenant should not be permitted to raise the implied warranty defense unless either the conditions in the dwelling have changed since the agency determination or the tenant shows that the agency determination cannot reasonably be sustained.[122] The tenant should not be entitled to a *de novo* consideration of the implied warranty defense, since otherwise the efficacy of the administrative procedure would be greatly impaired.[123]

117. If the tenant does not have the right to be represented by counsel the courts may hold that the proceedings have no force or effect until the tenant has had an opportunity for a trial *de novo* in superior court. *See* Mendoza v. Small Claims Ct., 49 Cal. 2d 668, 321 P.2d 9 (1958).

118. N.J. STAT. ANN. § 2A: 42-77(b) (Supp. 1972), which authorizes local agencies to reduce rent, provides: "Whenever it appears by preliminary investigation that a multiple dwelling is substandard the public officer shall cause a complaint to be served upon the owner of and parties in interest in such multiple dwelling, stating the reasons why said multiple dwelling is deemed substandard and setting a time and place for hearing before the public officer. The owners and parties in interest shall be given the right to file an answer and to appear and give testimony The rules of evidence shall not be controlling in hearings before the public officer."

119. See text accompanying notes 87-94 *supra.*

120. To insure uniformity in the agencies' decisions a list of rent impairing violations and suggestions for the appropriate percentage reduction in rent should be promulgated by the housing department. *See, e.g.*, N.Y. MULT. DWELL. LAW § 302-a (2)(c)1 (McKinney Supp. 1972).

121. *See* CAL. CODE CIV. PROC. § 1161(2) (West Supp. 1972).

122. Similarly, if the tenant is paying rent at the reduced rate, the agency determination should be a complete bar to an action for possession.

123. Once the landlord has made the repairs, if the tenant does not begin paying rent at the agreed rate the landlord should appeal to the local agency for a determina-

Although the specific details of this procedure need to be worked out, the advantages of making available an informal forum for the speedy resolution of rent withholding disputes are numerous. The burden of making the preliminary inquiry is taken from the courts and placed where it more properly lies—with a specialized agency responsible for enforcing housing codes. Also, any cash flow problems suffered by the landlord would be reduced to a minimum, thereby decreasing the possibility that the tenant's exercise of his rights would hinder the landlord's financial ability to make the repairs.

The tenant would benefit from this procedure in another way. A major drawback of the implied warranty theory is that if in the action for possession the landlord is found not to be in breach, the tenant's withholding of rent is considered wrongful and entitles the landlord to recover possession.[124] Thus, when a tenant makes the decision to withhold rent, he risks eviction for nonpayment if his conception of uninhabitable premises differs from that of the court. Considering the hardships encountered by many low-income tenants in seeking a new place to live, the possibility of being evicted for a mistake in judgment will seriously discourage tenants from exercising their right to withhold rent when the premises are substandard. However, if an agency is established that can determine quickly whether the premises have become substandard, and if so, the appropriate reduction in rent, it will not be necessary for a tenant to risk eviction for withholding rent. Unless a tenant who withholds rent in an erroneous but good faith belief that the premises are substandard is protected against forfeiting possession when he pays all rent that is found due,[125] the need for an agency similar to the one proposed is magnified greatly. Without the protective procedures of an agency such as that proposed, the promise of *Hinson* will be an illusory one for all but a few low-income tenants.

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tion that the premises are in substantial conformance with the housing codes and that the tenant is obligated to pay rent at the contract rate.

124. Although in *Hinson* this question was left unanswered, in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 (D.C. Cir. 1970), which *Hinson* apparently follows, the court stated that if the triers of fact find that no reduction in rent is warranted then possession shall be entered for the landlord. However, this has been changed by statute in the District of Columbia, see note 74 *supra.*

125. This is essentially the position taken by the UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 4.105(a), (Final Draft, Aug. 10, 1972), when a tenant defends an action for possession based on nonpayment of rent by showing that the premises are substandard. This position is also in accord with the equitable principle that the law abhors forfeitures. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 33 (2d ed. 1948). This principle is followed in CAL. CODE CIV. PROC. § 1179 (West 1955) which permits a court to relieve a tenant against forfeiture of a lease, in case of hardship, upon full payment of rent due. *See also,* CAL. CIV. CODE § 3275 (West 1970).

Conclusion

The decision in *Hinson v. Delis* represents a major break from the past in California landlord-tenant law. Although one hundred years ago the legislature imposed a duty to repair on the landlord, the operation of the common law rules of *caveat emptor* and independent covenants stymied the development necessary to insure that this duty was enforced. The tenant is now armed with an effective weapon, withholding payment of rent, to compel the landlord to make needed repairs, or put more bluntly: to compel the landlord to obey the law.

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